

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2013AP502-CR

Cir. Ct. No. 2011CM945

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY M. TELLER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Anthony Teller appeals a judgment sentencing him after the revocation of his probation and an order denying his motion for

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

resentencing. Teller argues the sentencing court was objectively biased because: (1) the court promised him at his original sentencing hearing that he would be sentenced to two years' imprisonment if he was revoked from probation; and (2) the court followed through on that promise at his sentencing after revocation hearing. We conclude the circuit court demonstrated the appearance of bias by promising to sentence Teller to two years' prison if he was revoked from probation. Because the appearance of bias constitutes objective bias, Teller is entitled to a new sentencing after revocation hearing before a different judge.

BACKGROUND

¶2 In November 2011, Teller was convicted of disorderly conduct, as a repeater. The parties jointly recommended that the court place Teller on probation for eighteen months. Before rendering its sentence, the sentencing court noted:

It's one thing after the next with you. So are you truly sorry? I have no idea. You probably have said that line 15 other times. Maybe you mean it this time. Maybe you don't. *But bad news for you is if you don't, you have a two-year prison sentence coming your way. And I'm more than willing and eager to give it to you if that is what you want to do.*

... I appreciate what you said today but it's in the transcript. So if you come back here and you haven't done what you said you're going to do ... *then you get what you should have coming probably today.*

(Emphasis added.)

¶3 The court then discussed the seriousness of Teller's offense, including its violent nature, and explained how Teller's subsequent actions reflected on his character. The court stated: "So I hope you're able to get the help you need. Time will tell. And—but if you aren't, understand, as I said before, *you get the bad news.* And I hope that motivates you to do everything you said you

were going to do.” (Emphasis added.) Ultimately, the court withheld sentence and placed Teller on probation for eighteen months.

¶4 In May 2012, Teller failed to appear in court for a review hearing, and the court issued a warrant for his arrest. At the hearing on Teller’s motion to quash the warrant, Teller’s counsel advised the court that Teller’s agent had requested that Teller be revoked from probation, that Teller had already waived his right to a revocation hearing, and that a revocation packet was being prepared for the court. The State took the position that “[t]he Court said that the defendant would serve two years in prison if he screwed up[,]” and, “unless [Teller] has a very good excuse as to why he [did] not show up [to court], we would ask that the Court impose the sentence that the Court said would occur if the defendant didn’t do what he was supposed to do.” The court declined to do anything until a sentencing after revocation hearing was scheduled.

¶5 Teller’s trial counsel filed a recusal motion, arguing the court had prejudged the sentencing after revocation hearing by promising Teller he would be sentenced to the maximum if he violated his supervision rules. Relying on *State v. Goodson*, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385, counsel argued the court’s statements at the original sentencing hearing amounted to an appearance of bias, which constituted objective bias, and violated Teller’s right to due process.

¶6 The circuit court held a joint recusal and sentencing after revocation hearing. At the hearing, the court first denied Teller’s motion for recusal. It reasoned that, pursuant to *State v. Boswell*, No. 2011AP2750-CR, unpublished slip op. (WI App Aug. 21, 2012), a circuit court is not biased if the court does not reference its earlier statements at a sentencing after revocation hearing and instead

relies on the proper sentencing factors. Because the court had not yet referenced any earlier comments at Teller's sentencing after revocation hearing, it concluded the motion was premature.

¶7 The court proceeded to sentencing. The court appropriately and thoroughly discussed each sentencing factor. It then stated:

I'm going to just take a minute, ... and I'm going to take a look at what I said at sentencing, and I want to remember what you said so I can try to figure out what the appropriate term of prison is. So it's going to take me a few minutes to read through this transcript, but I always read through transcripts before I sentence people 'cause I like to remember what you said then and what you've said now and where you're at.

The court highlighted that it had previously stated to Teller, "So I hope you're able to get the help you need. Time will tell. And—but if you aren't, understand, as I said before, you get the bad news[.]"

¶8 The court explained to Teller that, at the time of the original sentencing, it

provided you an opportunity to get that treatment and help that you needed, and in fact you got it, but you haven't done well with it; and as I indicated [in the original sentencing transcript], *you're going to have bad news today*. When people come back to be sentenced after revocation, it's usually not good news. You failed.

(Emphasis added.) The court sentenced Teller to two years' imprisonment, which consisted of one year and three months of initial confinement and nine months of extended supervision.

¶9 Teller filed a postconviction motion for resentencing, arguing the court was objectively biased in two ways. First, Teller contended the court

demonstrated the appearance of bias by promising Teller it would sentence him to two years' prison if he was revoked from probation. Second, Teller argued the court demonstrated actual bias by referencing its earlier promise at the sentencing after revocation hearing and following through on that promise.

¶10 Following a hearing, the circuit court denied Teller's motion. It again reasoned that, pursuant to *Boswell*, as long as the court considered the proper sentencing factors at any subsequent sentencing after revocation hearing, the court was permitted to advise the defendant at the original sentencing hearing that he or she would receive the maximum if revoked. It also concluded that it did not refer to its original sentencing statements at the sentencing after revocation hearing because when it used the phrase "bad news" at the sentencing after revocation hearing, it meant "bad news" in a colloquial sense and was not referring to a two-year prison term. Teller appeals.

DISCUSSION

¶11 "The right to an impartial judge is fundamental to our notion of due process." *Goodson*, 320 Wis. 2d 166, ¶8. Whether a circuit court was biased is a question of law that we review independently. *Id.*, ¶7. "We presume a judge has acted fairly, impartially, and without bias; however, this presumption is rebuttable." *Id.*, ¶8. "When evaluating whether a defendant has rebutted the presumption in favor of the court's impartiality, we generally apply two tests, one subjective and one objective." *Id.* "Either sort of bias can violate a defendant's due process right to an impartial judge." *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. Here, Teller concedes subjective bias is not at issue; therefore, we focus only on whether the court displayed objective bias.

¶12 There are two forms of objective bias. *Goodson*, 320 Wis. 2d 166, ¶9. The first is the appearance of bias. *Id.* “[T]he appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to ‘hold the balance nice, clear and true’ under all the circumstances.” *Gudgeon*, 295 Wis. 2d 189, ¶24 (citation omitted). The appearance of bias constitutes objective bias when a court’s statements cause an ordinary reasonable person “to discern a great risk” that the circuit court has prejudged the facts or law of the case. *Id.*, ¶¶25-26; *see also Goodson*, 320 Wis. 2d 166, ¶9.

¶13 The second form of objective bias is actual bias. *Goodson*, 320 Wis. 2d 166, ¶9. Actual bias occurs where “there are objective facts demonstrating ... the trial judge in fact treated [the defendant] unfairly.” *State v. McBride*, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994) (citation and internal quotation omitted). Teller argues both forms of objective bias are present in this case.

¶14 In support, Teller analogizes his situation to the ones presented in *Goodson*, 320 Wis. 2d 166, and *State v. Thomas*, No. 2010AP332-CR, unpublished slip op. (WI App July 27, 2010).² In *Goodson*, at the original sentencing hearing, the court warned the defendant: “[I]f you deviate one inch from these rules, and you may think I’m kidding, but I’m not, you will come back here, and you will be given the maximum, period.” *Goodson*, 320 Wis. 2d 166,

² *State v. Thomas*, No. 2010AP332-CR, unpublished slip op. (WI App July 27, 2010), is an unpublished, but authored, opinion that Teller cites for persuasive value. *See* WIS. STAT. RULE 809.23(3)(b).

¶2. The court later reiterated, “[Y]ou do one deviation from these rules, and you are going to come back here, and you are going to get the maximum” *Id.* The defendant was ultimately revoked and, at the subsequent reconfinement hearing, the court sentenced the defendant to the maximum. *Id.*, ¶5. The court explained the maximum sentence was appropriate, “not because that’s the sentence I’m giving you today, [but] because that’s the agreement you and I had back at the time that you were sentenced.” *Id.*

¶15 On appeal, Goodson argued he was entitled to resentencing because the circuit court demonstrated objective bias. *Id.*, ¶¶7-8. We agreed. *Id.*, ¶¶13, 16. We concluded the circuit court had demonstrated the appearance of bias by “unequivocally promis[ing] to sentence Goodson to the maximum period of time if he violated his supervision rules.” *Id.*, ¶13. We reasoned, “A reasonable person would conclude that a judge would intend to keep such a promise—that the judge had made up his mind about Goodson’s sentence before the reconfinement hearing.” *Id.* We also concluded the court had demonstrated actual bias by explicitly telling Goodson he was receiving the maximum sentence because “that’s the agreement you and I had back at the time you were sentenced.” *Id.*, ¶16. We stated, “[T]he court’s unequivocal promise to impose the maximum sentence and its subsequent follow-through on that promise violated Goodson’s due process right to be sentenced by an impartial judge.” *Id.*, ¶18.

¶16 In *Thomas*, the circuit court withheld sentence and placed Thomas on probation. *Thomas*, No. 2010AP332-CR, unpublished slip op. ¶2. The court advised Thomas that if he was revoked, it would sentence him to the maximum, and reiterated, “I’m telling you ahead of time you’re getting the maximum.” *Id.* The defendant was subsequently revoked and the court, without referring to its earlier promise, relied on the proper sentencing factors and sentenced Thomas to

the maximum. *Id.*, ¶3. We concluded that, similar to *Goodson*, the court had demonstrated the appearance of bias at the original sentencing hearing, and the appearance of bias was enough for us to reverse and remand for resentencing. *Id.*, ¶6. We also concluded that, because the court did not reference the promise it made at the reconfinement hearing, the record did not reflect actual bias. *Id.*, ¶7.

¶17 Teller first argues that, similar to *Goodson* and *Thomas*, the circuit court in this case demonstrated the appearance of bias. However, before considering Teller’s appearance of bias argument, we pause to note that the circuit court rejected Teller’s appearance of bias argument because of *Boswell*, No. 2011AP2750-CR, unpublished slip op. (WI App Aug. 21, 2012).³ The circuit court reasoned that, pursuant to *Boswell*, it was permitted to advise a defendant that he or she will receive the maximum if revoked as long as it did not reference that statement at a subsequent sentencing after revocation hearing.

¶18 There are two problems with the court’s reliance on *Boswell*. First, *Boswell* is an unpublished per curiam decision that should not have been relied on for any purpose, even persuasive value. *See* WIS. STAT. RULE 809.23(3)(b).

³ In *State v. Boswell*, No. 2011AP2750-CR, unpublished slip op. ¶2 (WI App Aug. 21, 2012), the court placed Boswell on probation and advised him that, if he was revoked for another operating while intoxicated offense, he would receive the maximum, but “if you commit a bunch of small things ... and are subsequently revoked and no violence and no alcohol, you probably won’t end up with three years in prison. But if I need to do it at some future date[,] you go back to prison.” Boswell was then revoked because of domestic violence and alcohol consumption; the court sentenced him to the maximum, but did not reference its earlier statements at the sentencing after revocation hearing. *Id.* On appeal, we concluded the circuit court was not objectively biased because the court did not reference any earlier statements at the sentencing after revocation hearing, and because the court’s statements at the original sentencing, though out of context could be construed as prejudgment, taken in context and considering the record as a whole, did not amount to prejudgment. *Id.*, ¶¶4-5. Instead, we concluded the court’s statements were an “attempt to ‘scare Boswell straight’ rather than a promise to impose the maximum sentence.” *Id.*, ¶5.

Second, the circuit court's interpretation of *Boswell* essentially eliminates the appearance of bias as a form of objective bias,⁴ which would impermissibly overrule part of *Goodson*. See *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). *Boswell* does not eliminate the appearance of bias as a way of proving objective bias.

¶19 In support of Teller's argument that the circuit court demonstrated the appearance of bias, Teller first emphasizes the court's statements: that, if he was revoked, he had "bad news" coming his way in the form of a two-year prison sentence; that the court was "more than eager and willing" to give him a two-year prison sentence; that, if he "screwed up" he would "get what he probably had coming to him"; and that, if he failed, he "would get the bad news." Teller argues that, similar to *Goodson* and *Thomas*, these statements amounted to a promise to sentence him to two years' prison if he was revoked from probation. He contends that, based on this promise, a reasonable person would believe he would receive a two-year prison sentence if revoked and, consequently, there was a great risk that the court had prejudged the case.

¶20 The State argues the court's comments did not constitute the appearance of bias because they were "not unequivocal" and not an explicit promise. The State asserts that, though Teller characterizes the court's statements

⁴ Admittedly, in *Boswell*, we did not explicitly use the terms actual bias and appearance of bias in our conclusion. For example, we did not explicitly say the circuit court did not demonstrate actual bias because it did not reference its earlier statements at the sentencing after revocation hearing and the court did not demonstrate the appearance of bias because its comments did not amount to prejudgment. Perhaps this lack of explicitness led the circuit court in this case to conclude that, pursuant to *Boswell*, it was permitted to advise a defendant that he or she would receive the maximum if revoked as long as it did not reference that comment at a subsequent sentencing after revocation hearing.

as a promise to impose the maximum sentence, “a reasonable person c[ould] interpret these statements as the court’s reiteration of the maximum exposure which Mr. Teller would face if his probation was revoked.” The State also argues that the court’s comments do not “guarantee[] the maximum sentence upon the defendant’s return.”

¶21 We disagree with the State. The court told Teller he had “bad news” in the form of “a two-year prison sentence coming [his] way,” and, if he came back to court, he would receive the “bad news.” Similar to the statements in *Goodson*, the court’s statements in this case amounted to an unequivocal promise to sentence Teller to two years’ prison if he was revoked from probation. *See Goodson*, 320 Wis. 2d 166, ¶13. A reasonable person would conclude that the court had made up its mind before the sentencing after revocation hearing and that the court intended to keep its promise at the sentencing after revocation hearing.⁵ *See id.* Accordingly, we conclude the circuit court demonstrated the appearance of bias, which establishes objective bias. *See id.*

¶22 That being said, we appreciate that circuit courts sometimes reference the maximum exposure a defendant will face if revoked in order to motivate, or even “scare,” the defendant into succeeding on probation. However, we emphasize that a court must be mindful to speak only in terms of possible consequences, and not in what can be readily construed as promises. *See*

⁵ We also observe that, *before* the sentencing after revocation hearing, the State advised the court that “[t]he Court said that the defendant would serve two years in prison if he screwed up[,]” and, “unless [Teller] has a very good excuse as to why he [did] not show up [to court], we would ask that the Court impose the sentence that the Court said would occur if the defendant didn’t do what he was supposed to do.” Therefore, the State, at some point, also believed the sentence had already been predetermined.

Goodson, 320 Wis. 2d 166, ¶17 (“A court may certainly tell a defendant what *could* happen if his or her extended supervision is revoked. But telling a defendant what *will* happen imperils the defendant’s due process right to an impartial judge at a reconfinement hearing.”).

¶23 Teller next argues the circuit court demonstrated actual bias at the sentencing after revocation hearing. Teller emphasizes that, at the original sentencing hearing, the circuit court equated “bad news” with a two-year prison sentence, and then, at the sentencing after revocation hearing, the circuit court read the original sentencing hearing transcript, advised Teller “as I indicated [in the transcript], *you’re going to have bad news today*[.]” and sentenced him to two years’ imprisonment. (Emphasis added.) Teller argues that, similar to **Goodson**, the circuit court demonstrated actual bias because it referenced its earlier promise and then sentenced Teller consistent with that promise.

¶24 The State asserts that the court did not demonstrate actual bias because, unlike **Goodson**, it never explicitly told Teller it was basing its sentence on the statements made at the original sentence hearing. The State also contends that, when the court told Teller he would “have bad news today,” the court used the term “bad news” in a colloquial sense and did not mean a two-year prison sentence. In support, the State points out that, after the court told Teller he would receive “bad news,” it stated, “When people come back to be sentenced after revocation, it’s usually not good news.”

¶25 Because we have determined the circuit court demonstrated objective bias in the form of the appearance of bias, we need not determine whether the circuit court demonstrated actual bias. *See Goodson*, 320 Wis. 2d 166, ¶9; *see also Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938)

(only dispositive issues need be addressed). Nonetheless, we observe that, although the circuit court referenced the original sentencing transcript when it advised Teller he would receive “bad news today,” the record also shows that, at the postconviction hearing, the court was confused about why telling a defendant he would receive “bad news” was improper. When Teller’s postconviction counsel explained the court had equated the term “bad news” with a two-year prison sentence, the court asked, “Is that what I said?” Therefore, we agree with the State that the record does not support actual bias to the extent it did in *Goodson*. See *Goodson*, 320 Wis. 2d 166, ¶16 (Court was actually biased when it explicitly told the defendant he was receiving his sentence based on the promise derived at the original sentence hearing.).

¶26 However, because the court’s promise at the original sentence hearing amounted to the appearance of bias, which constitutes objective bias, Teller is entitled to resentencing. We therefore reverse and remand for resentencing before a different judge.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

